

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA,

Respondent,

v.

JULIUS M. GLADNEY,

Petitioner.

No. CR-05-6023-FVS
CV-09-5024-FVS

ORDER DENYING PETITIONER'S
SECTION 2255 MOTION

THIS MATTER came before the Court on Petitioner's motion under 28 U.S.C. § 2255 to vacate, set aside, or correct sentence by a person in federal custody. (Ct. Rec. 151). Petitioner is proceeding pro se. Respondent is represented by Robert A. Ellis.

BACKGROUND

On September 13, 2005, Petitioner was charged by superseding indictment with distributing over 5 grams of cocaine base on three separate occasions: July 1, 2005 (Count 1), July 6, 2005 (Count 2), and July 19, 2005 (Count 3). (Ct. Rec. 7). A jury trial commenced on May 30, 2006. (Ct. Rec. 82). On June 1, 2006, the jury returned a verdict of guilty as to all three counts. (Ct. Rec. 89). The Court sentenced Petitioner, on November 30, 2006, to a term of 97 months on Count 1, 120 months on Count 2 and 120 months on Count 3, all to run concurrently. (Ct. Rec. 121). Judgment was entered on December 5, 2006. (Ct. Rec. 122).

1 Defendant filed a Notice of Appeal on December 7, 2006. (Ct.
2 Rec. 124). On February 28, 2008, the Ninth Circuit Court of Appeals
3 affirmed the decision of the District Court. (Ct. Rec. 149).
4 Defendant thereafter filed a writ of certiorari with the United States
5 Supreme Court, which was denied on May 12, 2008. *Gladney v. United*
6 *States*, 128 S.Ct. 2464 (2008).

7 On April 13, 2009, Defendant filed a "Petition for a Writ of
8 Habeas Corpus Under 28 U.S.C. § 2255." (Ct. Rec. 151). The
9 government filed its response on August 19, 2009 (Ct. Rec. 157), and
10 Petitioner's reply was received on August 26, 2009 (Ct. Rec. 161). On
11 August 19, 2009, the government also filed a motion for judgment on
12 the pleadings with respect to the instant petition. (Ct. Rec. 158).

13 DISCUSSION

14 I. Legal Standard

15 28 U.S.C. § 2255 provides, in part:

16 A prisoner in custody under sentence of a court established by
17 Act of Congress claiming the right to be released upon the ground
18 that the sentence was imposed in violation of the Constitution or
19 laws of the United States, or that the court was without
jurisdiction to impose such sentence, or that the sentence was in
excess of the maximum authorized by law, or is otherwise subject
to collateral attack, may move the court which imposed the
sentence to vacate, set aside or correct the sentence.

20 A petitioner is entitled to an evidentiary hearing on the motion
21 to vacate his sentence under 28 U.S.C. § 2255, unless the motions and
22 the files and records of the case conclusively show that the prisoner
23 is entitled to no relief. This inquiry necessitates a twofold
24 analysis: (1) whether Petitioner's allegations specifically delineate
25 the factual basis of his claim; and, (2) even where the allegations
26 are specific, whether the records, files and affidavits are conclusive
against the Petitioner. *United States v. Taylor*, 648 F.2d 565, 573

1 (9th Cir.), cert. denied, 454 U.S. 866 (1981) (internal quotations,
2 citations and footnote omitted).

3 Because the Court finds that the evidence in this case is
4 conclusive against Petitioner (*see infra*), the Court also finds that
5 an evidentiary hearing on the motion to vacate is not necessary.
6 Petitioner's request in this regard (Ct. Rec. 151 at 9-10) is
7 therefore denied.

8 **II. Issues Presented**

9 Petitioner presents the following grounds for relief pursuant to
10 28 U.S.C. § 2255:

- 11 1. INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL
- 12 3. PROSECUTORIAL MISCONDUCT
- 13 3. COLLUSION

14 (Ct. Rec. 151).

15 **III. Analysis**

16 **A. Ineffective Assistance of Counsel**

17 Petitioner argues that his trial counsel rendered ineffective
18 assistance by failing to "investigate, or call witnesses in defense or
19 to otherwise produce any available exculpatory evidence." (Ct. Rec.
20 151). Petitioner argues that his trial counsel was not prepared for
21 trial as there were "alibi witnesses" Petitioner's attorney failed to
22 call in his defense.

23 In reviewing a claim of ineffective assistance of counsel, the
24 Court applies a two-part test: "First, the defendant must show that
25 counsel's performance was deficient. Second, the defendant must show
26 that the deficient performance prejudiced the defense." *United States*
v. Recio, 371 F.3d 1093, 1109 (9th Cir. 2004) (quoting *Strickland v.*

1 *Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674
2 (1984)). Under the first element, the Court must examine "whether
3 counsel's assistance was reasonable considering all the
4 circumstances." *Strickland*, 466 U.S. at 688, 104 S.Ct. at 2065. This
5 requires the Court to analyze counsel's performance with some
6 deference, as "counsel is strongly presumed to have rendered adequate
7 assistance and made all significant decisions in the exercise of
8 reasonable professional judgment." *Id.* at 690, 104 S.Ct. at 2066.
9 Counsel's performance is not ineffective unless it fails to meet an
10 objective standard of reasonableness under prevailing professional
11 norms. *Id.* at 688, 104 S.Ct. at 2065.

12 Under the second element, it must be shown "that counsel's errors
13 were so serious as to deprive the defendant of a fair trial." *Recio*,
14 371 F.3d at 1109 (quoting *Strickland*, 466 U.S. at 687, 104 S.Ct. at
15 2064). "It is not enough for the defendant to show that the errors
16 had some conceivable effect on the outcome of the proceeding."
17 *Strickland*, 466 U.S. at 693. Indeed, "[v]irtually every act or
18 omission of counsel would meet that test, and not every error that
19 conceivably could have influenced the outcome undermines the
20 reliability of the result of the proceeding." *Id.* (citation omitted).
21 Rather, Petitioner "must show that there is a reasonable probability
22 that, but for counsel's unprofessional errors, the result of the
23 proceeding would have been different. A reasonable probability is a
24 probability sufficient to undermine confidence in the outcome." *Id.*
25 at 694.

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1 **1. Reasonable Performance**

2 Petitioner claims that his trial counsel was ineffective because
3 he failed to introduce impeachment testimony critical to his defense.
4 Petitioner claims that his counsel failed to interview witnesses,
5 investigate, and locate and call alibi witnesses on his behalf.
6 Petitioner claims there were many witnesses that should have been
7 called, including individuals specifically named in Petitioner's reply
8 brief. (Ct. Rec. 161).

9 However, Petitioner's argument lacks a specific allegation which,
10 if true, would entitle him to relief. *See United States v. Hearst*,
11 638 F.2d 1190, 1194-95 (9th Cir. 1980), *cert. denied*, 451 U.S. 938,
12 101 S.Ct. 2018, 68 L.Ed.2d 325 (1981) (A petitioner must make specific
13 factual allegations which, if true, would entitle him to relief).
14 From Petitioner's assertions, it is not clear what, if anything, the
15 named individuals would have offered that would have been valuable to
16 his defense.

17 In any event, the record demonstrates that Petitioner's trial
18 counsel did not fail to investigate or prepare for trial as alleged by
19 Petitioner. Petitioner's counsel was clearly aware of the presence of
20 others at the scene of the drug transactions and exploited the
21 presence of such individuals as possible alternative theories for how
22 the CIs obtained the cocaine. For example, during cross-examination
23 of Detective Bradford Gregory, defense counsel inquired about the
24 presence of a "Hispanic male" during the July 1 and July 6 buys;
25 during cross-examination of Sergeant Randal Roach, defense counsel
26 inquired about the presence of "several individuals going in and out"
of the barbershop, the interaction of the CIs with Godfrey Davis (a

1 convicted drug felon), the contact made between the CIs and a vehicle
2 in the parking lot, and the contact between the CIs and "another
3 unidentified individual standing on the street" during the July 1 buy;
4 during cross-examination of Detective B.J. Moos, defense counsel
5 inquired about the presence of a "light skinned black male or
6 Hispanic" during the July 6 buy; during cross-examination of Deputy
7 Craig Cole, defense counsel inquired about the presence of "quite a
8 few individuals" at the July 1 buy and the presence of a "black male"
9 at the July 6 buy; during cross-examination of CI Henry Grisby,
10 defense counsel inquired about the presence of Godfrey Davis, the
11 presence of a "light skinned black male or Hispanic," and the presence
12 of "other people" at the July 1 buy as well as the presence of a
13 "light skinned black male or Hispanic" at the July 6 buy; and during
14 cross-examination of CI Holli Meredith, defense counsel inquired about
15 whether CI Grisby had contact with "a lot of people in front of the
16 store" and the presence of a "Hispanic male" in the backroom of the
17 barbershop during the July 1 buy as well as the presence of the same
18 "Hispanic male" at the apartment during the July 6 buy. (Trial Tr.
19 41-134). Furthermore, at the October 25, 2006, hearing on
20 Petitioner's motions for a new trial and for release from custody,
21 Petitioner's trial counsel addressed the Court stating "[i]f the court
22 remembers, there is this phantom Hispanic male who is always at these
23 deals, who was always present during the first one, second one, and I
24 believe the third one. And it has always been our position that it
25 was not [Petitioner] who did these sales, it was that individual who
26 met with Grisby." (Mot. Hr'g Tr. 12). Contrary to Petitioner's
assertions, his trial counsel was aware of the presence of others at

1 the buys and crafted the defense of Petitioner by exploiting the
2 presence of such individuals.

3 The decision to not call these individuals as witnesses was
4 likely a strategic choice by Petitioner's defense counsel. *United*
5 *States v. Sanchez-Cervantes*, 282 F.3d 644, 672 (9th Cir. 2002) (the
6 court should not "second-guess" an attorney's tactical decisions");
7 *Strickland*, 466 U.S. at 690 (strategic choices made after a thorough
8 investigation of the relevant law and facts "are virtually
9 unchallengeable"). "Tactical decisions that are not objectively
10 unreasonable do not constitute ineffective assistance of counsel."
11 *Hensley v. Crist*, 67 F.3d 181, 185 (9th Cir. 1995). Petitioner's
12 trial counsel may have decided to not call any of the individuals
13 identified by Petitioner based upon witness unavailability,
14 credibility issues, or the possibility that the witness would say
15 something unfavorable to the defense. It could be that none of these
16 individuals had valuable testimony to give. These concerns are
entirely reasonable.

17 Although defendants have a Sixth Amendment right to "reasonably
18 effective" legal assistance, *Strickland*, 466 U.S. at 687, there is no
19 Constitutional right to "successful" assistance of counsel. While
20 Petitioner asserts that he received ineffective assistance because
21 "for trial counsel to permit a conviction based on the paltry evidence
22 herein shows failure of trial counsel to do witness interviews,
23 investigation and trial preparation" (Ct. Rec. 151 at 6), it is
24 apparent, based on the foregoing, that counsel's performance was
25 reasonable under prevailing professional norms. *Strickland*, 466 U.S.
26 at 688. Petitioner's representation was not deficient.

1 **2. Prejudice to Defense**

2 In any event, Petitioner is not able to demonstrate his counsel's
3 performance was prejudicial.

4 Again, Petitioner has not made specific factual allegations as to
5 his ineffective assistance of counsel claim. While Petitioner asserts
6 that "alibi witnesses" would have shown that he did not provide the
7 cocaine to the CIs, Petitioner's assertions fail to identify what the
8 individual "alibi witnesses" would have specifically contributed to
9 his defense.

10 Petitioner argued in a similar vein at the October 25, 2006,
11 hearing on Petitioner's motions for a new trial and for release from
12 custody. Petitioner claimed that the declaration of Mr. Grisby's
13 mother, Juanita Grisby, refuted the CI's testimony that Petitioner had
14 provided him with cocaine. In that context, the Court indicated that
15 "there are two witnesses, Mr. Grisby and Miss Meredith who did testify
16 concerning the events that were the subject of the charges, and they
17 were cross-examined and sought to be impeached significantly by
18 counsel. . . . I don't believe that a new trial would probably result
19 in acquittal as to the charges involved." (Mot. Hr'g Tr. 15-16). The
20 Ninth Circuit affirmed the Court's ruling in this regard. *United*
21 *States v. Gladney*, 265 Fed. Appx. 681, 683 (9th Cir. 2008). The Ninth
22 Circuit held that "Grisby's testimony was not the only evidence
23 presented to establish the elements of the offense. Meredith and five
24 officers involved in the transactions testified, and the government
25 presented exhibits such as the cocaine purchased by Grisby
26 Grisby's evidence was not uncorroborated, and it did not provide 'the
only evidence of an essential element of the government's case.'" *Id.*

1 Both this Court and the Ninth Circuit have determined that substantial
2 evidence supported the jury's finding of guilt in this case.

3 Based on the foregoing, it is apparent that Petitioner's
4 representation was neither deficient, nor did it result in prejudice
5 to Petitioner. Not only has Petitioner not provided a specific
6 allegation as to what the individual "alibi witnesses" would provide,
7 it is also clear that Petitioner's trial counsel was aware of the
8 presence of others at the buys and used the presence of these
9 individuals to create alternative theories for how the CIs obtained
10 the cocaine. This trial strategy, as opposed to having these
11 individuals testify, is reasonable. In addition, because substantial
12 evidence existed upon which the jury could have relied in finding
13 Petitioner guilty, Petitioner is not able to show prejudice from any
14 alleged failures of counsel. Accordingly, Petitioner's ineffective
15 assistance of counsel claim is denied.

16 **B. Prosecutorial Misconduct**

17 Petitioner contends that the government's attorney knowingly
18 presented false evidence to obtain his conviction at trial. (Ct. Rec.
19 151). Petitioner's claim in this regard is based upon the declaration
20 of Mr. Grisby's mother, Juanita Grisby, which relates that Mr.
21 Grisby's trial testimony was false.

22 The government must not knowingly present false evidence to the
23 Court. *Napue v. Illinois*, 360 U.S. 264, 269 (1959). To prevail on a
24 *Napue* claim, Petitioner must demonstrate "(1) the testimony (or
25 evidence) was actually false, (2) the prosecution knew or should have
26 known that the testimony was actually false, and (3) that the false
testimony was material." *United States v. Zuno-Arce*, 339 F.3d 886,

1 889 (9th Cir. 2003).

2 **1. False Testimony**

3 Petitioner has not demonstrated that Mr. Grisby's trial testimony
4 was false. All that has been presented is a third-party allegation
5 that Mr. Grisby fabricated his testimony at trial. While the third
6 party is Mr. Grisby's mother, this Court has already considered and
7 rejected the argument that her declaration demonstrates Mr. Grisby's
8 testimony was false. (Mot. Hr'g Tr. 15-16). As indicated above, Mr.
9 Grisby's trial testimony is supported by substantial evidence.

10 **2. Prosecution Knowledge**

11 Petitioner has also not established that the prosecutor knew the
12 testimony was false. Juanita Grisby's declaration, even if true, does
13 not provide a basis for a finding that the prosecutor **knew** Mr. Grisby
14 was lying during trial. *Morales v. Woodford*, 388 F.3d 1159, 1178-1179
15 (9th Cir. 2004) (recantation by trial witness insufficient where
16 movant did not set out a factual basis for attributing any knowing
17 presentation of perjury by the government). Even if Mr. Grisby's
18 testimony was false, Petitioner has failed to make a showing that the
19 prosecutor knew it was false.

20 **3. False Testimony was Material**

21 Even if Petitioner was able to show that Mr. Grisby's testimony
22 was false and that the prosecutor knew it was false, Petitioner is
23 still not able to show that it was "material." In assessing the
24 materiality of the alleged false testimony, the Court must "determine
25 whether there is 'any reasonable likelihood that the false testimony
26 could have affected the judgment of the jury.'" *Hayes v. Brown*, 399
F.3d 972, 984 (9th Cir. 2005) (citation omitted).

1 As noted above, the Ninth Circuit found that, "Grisby's testimony
2 was not the only evidence presented to establish the elements of the
3 offense. Meredith and five officers involved in the transactions
4 testified, and the government presented exhibits such as the cocaine
5 purchased by Grisby Grisby's evidence was not uncorroborated,
6 and it did not provide 'the only evidence of an essential element of
7 the government's case.'" *Gladney*, 265 Fed. Appx. at 683.
8 Accordingly, the guilty verdict in this case was not based solely on
9 Mr. Grisby's testimony; substantial evidence supported the jury's
10 finding of guilt. Since the government had a strong case even absent
11 Mr. Grisby's testimony, the testimony was not material.

12 Because Petitioner is not able to satisfy any prong of the *Zuno-*
13 *Arce* test, he has failed to establish a *Napue* claim. The Court finds
14 that Petitioner has failed to demonstrate that the government
15 knowingly presented false material evidence to the Court.

16 C. Collusion

17 Petitioner also asserts that his trial counsel and counsel for
18 the government agreed to conceal exculpatory evidence and agreed that
19 trial counsel would coerce Petitioner into not testifying. (Ct. Rec.
20 151). Petitioner also alleges that the attorneys each knew that two
21 witnesses had fabricated the evidence which lead to Petitioner's
22 arrest for distributing cocaine base. Petitioner claims his
23 allegations in this regard are supported by Juanita Grisby's
24 declaration.

25 Petitioner has provided nothing, other than his conclusory claim,
26 to support the assertion that his trial counsel and counsel for the
government agreed to prevent exculpatory evidence from being

1 introduced at trial. While Petitioner claims that he was "coerced
2 into" not testifying on his own behalf, Petitioner's declaration
3 indicates that he "listened to" counsel's advice in this regard.
4 Moreover, Juanita Grisby's declaration simply does not demonstrate
5 that the prosecution knew that Mr. Grisby was providing false
6 testimony during trial. Juanita Grisby's declaration provides no
7 basis to believe that the government or defense counsel knew of the
8 allegations contained in that declaration before they were brought
9 forward at the October 25, 2006, hearing on Petitioner's motions.
10 Petitioner has failed to establish collusion between counsel.

11 **RULING**

12 The Court being fully advised, **IT IS HEREBY ORDERED** as follows:

13 1. Petitioner's motion to vacate, set aside, or correct his
14 sentence pursuant to 28 U.S.C. § 2255 (**Ct. Rec. 151**) is **DENIED**.

15 2. The government's motion for judgment on the pleadings (**Ct.**
16 **Rec. 158**) is **GRANTED**.

17 3. The District Court Executive is directed to enter judgment in
18 favor of Respondent and **CLOSE** this case as well as the corresponding
19 civil case: **CV-09-5024-FVS**.

20 **IT IS SO ORDERED.** The District Court Executive is hereby
21 directed to enter this order and furnish copies to Petitioner and to
22 counsel.

23 **DATED** this 1st day of October, 2009.

24 S/Fred Van Sickle
25 Fred Van Sickle
26 Senior United States District Judge